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IN THE THIRD DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE CITY CORPORATION, Plaintiff, v. UTAH INLAND PORT AUTHORITY, STATE OF UTAH, GARY R. HERBERT, and SEAN D. REYES, Defendants.	**UTAH INLAND PORT AUTHORITY'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** Case No. 190902057 Judge James Blanch

Defendant Utah Inland Port Authority ("the UIPA"), by and through its undersigned counsel of record, hereby submits this Memorandum in Opposition to Plaintiff Salt Lake City Corporation's (the "City") Motion for Preliminary Injunction (the "Motion").

RELIEF REQUESTED AND GROUNDS THEREFORE

The City's Motion should be denied in its entirety because the City does not and cannot meet the heavy burden it bears in seeking the extraordinary relief it requests, which would cause irreparable harm not only to the UIPA, but also to the State of Utah and its citizens. For reasons discussed in the State of Utah's Memorandum in Opposition to the Motion, which the UIPA

incorporates herein by reference, the City is not likely to succeed on the merits of its claims. Moreover, the City cannot demonstrate it will suffer any harm—let alone irreparable harm—without the issuance of an injunction, that the alleged injury to the City outweighs the threatened injury of granting the broad injunctive relief the City requests, or that the injunction would not be adverse to the public interest. Because the City cannot satisfy the requirements for issuance of an injunction, its Motion should be denied.

BACKGROUND

The City effectively seeks through the Motion to substantially impair efforts to develop and plan the UIPA—a project approved by the Legislature and the Governor after years of research and planning. Development of an inland port in Utah has "been the subject of multiple studies and countless discussions in and around the Salt Lake City area for more than 40 years." (*See* Inland Port Background*, available at* https://www.utahinlandport.org/inland-port-background-1). The Utah Legislature first considered the establishment of an inland port during the 1990s. (*Id.*). However, legislative plans to develop an inland port did not come to fruition at that time. (*Id.*). In 2016, Governor Herbert created the "Inland Port Exploratory Committee . . . to thoroughly study the potential of an inland port in Utah." (*See* "Inland Port is a Win for Utah," *available at* https://business.utah.gov/news/inland-port-is-a-win-for-utah/).

In August 2017, the Committee commissioned a private feasibility study, which confirmed Utah met the criteria to create a successful inland port. (*See id.*). Among other things, "the feasibility study noted that Utah stands at a unique point in time, with a large tract of undeveloped land that lies at the intersection of an international airport, major freeway systems

and intermodal rail hub. This presents a tremendous opportunity to develop a product to market the state as an international business destination." (*Id.*).

During the 2018 legislative session, the Utah Inland Port Authority Act (the "Act") was passed and became effective in March 2018. (*Id.*). The Act passed the Senate on a vote of 23 for, 4 against, and 2 abstaining, and the House on a vote of 61 for, 11 against, and 3 abstaining. (*See* Bill Status/Votes, *available at* https://le.utah.gov/~2018/bills/static/sb0234.html). Governor Herbert signed the bill on March 16, 2018, with an effective date of that same day. (*Id.*). The Act established an inland port authority and designated the area in which the authority would have jurisdiction. (*See* Inland Port Background *available at* https://www.utahinlandport.org/inland-port-background-1). After some amendments to the Act during a 2018 interim session, the UIPA's jurisdictional land boundary was established on 16,147 acres of land in Salt Lake County's Northwest Quadrant. (*Id.*).

Shortly after the Act was passed, Governor Herbert called the creation of the UIPA a "win for Utah." (Inland Port a Win for Utah, *available at* https://business.utah.gov/news/inland-port-is-a-win-for-utah/). More specifically, the Governor's office stated:

> With Utah's strong economy and workforce, an inland port will elevate the state as a global business destination, act as a logistics center for the entire Western US and attract more international companies to relocate to Utah. Building upon existing transportation infrastructure, the global trade port will act as a highly cost-effective distribution hub connecting Salt Lake City to major seaports and western locations. Primary activities at the inland port will include unloading and loading shipping containers, value-added manufacturing, and repackaging items shipping them to thousands of destinations. The port will also include a customs office allowing international customers to clear their products through customs before being processed and distributed.

> The inland port project is a generational opportunity with the potential to impact the entire state and intermountain region. International business in Utah is big business and contributes significantly to our place as the nation's fastest growing economy. An inland port will position Utah as a center for global trade and take the state from the "Crossroads of the West" to the "crossroads of the world."

(*Id.*).

Once the Act became effective, 11 board members were selected. Representation includes Salt Lake City, the Salt Lake International Airport, Salt Lake County, West Valley City, the Utah Department of Transportation ("UDOT"), the Governor, the Utah Legislature, and the business community. The UIPA and its Board have been tasked with the responsibility of making the vision that drove the creation of the UIPA a reality. (Declaration of Jack C. Hedge ("Hedge Decl.") at ¶ 4, a true and correct copy of which is attached hereto as Exhibit A).

The harm that would befall the UIPA, and by extension the citizens of this State, if the City's Motion were granted would be extensive and, in many cases, entirely irreparable. For example, the Governor's Office of Economic Development ("GOED") is currently involved in negotiations "with a number of very prominent companies that are interested in making substantial investments within the [UIPA's] jurisdictional area." (Declaration of Benjamin Hart ("Hart Decl.") at ¶ 8, a true and correct copy of which is attached hereto as Exhibit B). The magnitude of the investments under discussion is likely to exceed $100 million and would create more than 3,000 jobs with a likely salary of $100,000 or more per year. (*Id.*). "Most if not all of the companies with which the GOED is negotiating will be making decisions regarding where they will relocate with the next 9 to 12 months, and all are considering making investments in states other than Utah." (*Id.* at ¶ 9). "One of the key factors for these companies in deciding

where to make their investments is the availability and magnitude of financial incentives from relevant jurisdictions." (*Id.* at ¶ 10). Accordingly, "[i]f the UIPA were unable over the next year to commit tax differential that is scheduled to flow to the UIPA pursuant to the [Act] . . . as part of the package of incentives GOED can offer, Utah in general, and the [UIPA] jurisdictional area, more specifically, would be at a huge competitive disadvantage in recruiting these companies, and will likely lose these companies to other states." (*Id.* at ¶ 11). Moreover, contrary to the City's repeated assertions, there is absolutely no risk that the UIPA will spend tax revenue that would otherwise belong to the City because "[i]n offering UIPA tax differential as an incentive to companies looking to invest within the [UIPA] jurisdictional area, the GOED and the UIPA will make it clear that the funds will not be available if the . . . UIPA is determined to be unconstitutional." (*Id.* at ¶ 12).

Of particular concern in the City's Motion is its request for an order barring the UIPA from "proceeding in any way with the design or construction of 'site improvements or preparation costs' and 'publicly owned infrastructure and improvements' on the jurisdictional land." (Motion at 2). Although the UIPA is not currently in the process of planning any specific piece of site improvements or public infrastructure for the jurisdictional land," it is engaged in broad business planning and the creation of potential development scenarios as they relate to the policies, procedures, and business practices of the UIPA. (*Id.* at ¶ 14). Imposing such a broad and overwhelming constraint would cause immediate and irreparable harm to the UIPA because "planning" of the potential types and uses of certain kinds of site improvements and public infrastructure is an essential part of, among other things, the UIPA's business plan, which is

presently in progress. (*Id.*).[1] If the UIPA cannot undertake "planning" activities related to the jurisdictional land during the pendency of this action, the UIPA will effectively be brought to a stand-still. (*Id.*).

RESPONSE TO THE CITY'S STATEMENT OF FACTS

Many of the City's assertions in the "Facts" section of the Motion are incorrect and completely baseless. However, only a few of the incorrect statements require correction for purposes of responding to the Motion. First, as previously explained, the City's assertion that the UIPA plans to immediately and irreversibly spend or commit City tax revenue is wrong. No property tax funds will be transferred to the UIPA until the first quarter of 2020 at the earliest. (Hedge Decl. at ¶ 5). Between now and when the UIPA begins receiving tax differential monies—which will not occur until late January or early February of 2020—any and all funds the UIPA expends will be allocated to the UIPA by the Utah Legislature from general state funds. (*Id.* at ¶ 7). The UIPA expects to receive less than $461,367 in property tax differential from Salt Lake County in approximately February 2020, and "there is zero chance

[1] Section 11-58-602(6) of the Utah Code states that the UIPA "may not spend property tax differential revenue collected from [UIPA] jurisdictional land" until a business plan is formally adopted by the UIPA's Board. The UIPA has retained outside consultants to conduct a series of community outreach meetings to identify issues, hold task force planning meetings to consider and make plans to deal with such issues, develop alternatives or scenarios for port development for consideration and selection by the Board and take other actions necessary to draft, amend and ultimately finalize the UIPA's business plan. (*Id.* at ¶ 8). Finalization of the business plan by the consultants is not expected to be completed before December 31, 2019, at the earliest. (*Id.*). The UIPA's Board may or may not review and revise drafts of the plan but Board approval can only occur after the business plan is finalized. (*Id.*). The UIPA anticipates that the draft business plan will present to the UIPA's Board a minimum of three alternative proposals with very different structural concepts for how the UIPA will be operated, how and what it will own, and other fundamental matters. (*Id.*). Once the draft business plan is received from the consultants (again, at the year-end 2019), it must then be reviewed, considered, and acted upon by the UIPA Board. (*Id.* at ¶ 9). Assuming this happens immediately upon completion (year end 2019), once the business plan is approved, it will take many months of planning before any design, development, or construction of any infrastructure improvements or other major activities can commence. (*Id.*).

that the UIPA will spend any tax differential dollars before February 2020." (*Id.* at ¶¶ 6-7). This is particularly important because the UIPA is eager to have this case resolved on its merits as quickly as possible and has requested that the Court rule on dispositive motions in this matter before year end. (*See* Dkt. No. 32). This will allow this matter to be fully resolved on the merits before the UIPA ever receives any tax differential monies, which completely eliminates the potential harm the City complains about.

Second, although the City is correct that the UIPA is authorized by statute to apply for and receive a $5 million loan from UDOT that will be secured by property tax differential, due to the uncertainty caused by the instant lawsuit, any pledge that the UIPA makes of tax differential monies as security for any loan—including any loan from UDOT—will be conditional. (*Id.* at ¶ 11). More specifically, if the UIPA decides to apply for the loan from UDOT, "it will not make any pledge of tax differential usage without the express written acknowledgment of both parties to any such agreement that "such commitment will only be binding if this Court rules that the Legislature's creation of the UIPA was not unconstitutional." (*Id.*).

Third, the City's suggestion that the UIPA will immediately begin "design, development, or construction" of public infrastructure is incorrect. The UIPA will not begin work on the design, development, or construction of any public infrastructure projects until sometime after February 2020. (*Id.* at ¶ 12). Similarly, the City is also incorrect to the extent it suggests that the UIPA is in the process of planning any specific piece of "site improvements or public infrastructure for the jurisdictional land." (*Id.* at ¶ 14). The UIPA's planning, at this time, is limited to broad business planning and the creation of potential development scenarios as it relates to the policies, procedures, and business practices of the UIPA. (*Id.*). It does not include

any specific infrastructure or site improvements other than how the UIPA can condition the use of any of the available tax differential to incentivize certain types of infrastructure and site improvements by owners and developers of the land. (*Id.*).

Fourth, the City's expressed concern about what may happen "[i]f a road is constructed across the old landfill site [just north of I-80 between approximately 6000 West and 7600 West]," and the "significant remediation" that would allegedly be required if such a road were constructed is completely misplaced. The "UIPA does not own or lease the old landfill site, has no right to build a road on such site, and has no plan at this time, and is not aware of any plans, to construct a road 'across the old landfill site' as called out in the City's Motion." (*Id.* at ¶ 13). "No decision on whether such a road is even useful or necessary would be made before February 2020 and any acquisition of land rights, and the design or construction of such a road would not begin for many months, if not years, thereafter." (*Id.*).

STANDARD FOR RECEIVING INJUNCTIVE RELIEF

Rule 65A of the Utah Rules of Civil Procedure enumerates the four well-known requirements that a party must demonstrate to obtain a preliminary injunction: (i) a substantial likelihood of prevailing on the merits of the underlying claim, (ii) irreparable harm unless the injunction issues, (iii) the threatened injury to the applicant outweighs the potential harm caused to the party enjoined, and (iv) the injunction would not be adverse to the public interest. Utah R. Civ. P. 65A(e)(1)–(4). The party seeking a preliminary injunction or temporary restraining order bears the burden of showing that they satisfy all four requirements. *See, e.g.*, *Aquagen International, Inc. v. Calrae Trust*, 972 P.2d 411, 413 (Utah 1998).

Courts have repeatedly recognized that preliminary injunctions are "extraordinary remed[ies] [that] should not be lightly granted." *Systems Concepts, Inc. v. Dixon*, 669 P.2d 421, 425 (Utah 1983); *see also Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003) ("It is well settled that a preliminary injunction is an extraordinary remedy, and that it should not be issued unless the movant's right to relief is clear and unequivocal." (internal quotation omitted)). Court have further explained that "[a]ny motion for injunctive relief that seeks to alter the status quo . . . must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1231 (10th Cir. 2005) (internal citation omitted).[2]

ARGUMENT

The Court should deny the City's Motion because the City cannot satisfy the prerequisites for issuance of an injunction. As an initial matter, the City cannot demonstrate that it is substantially likely to prevail on the merits of its claims for the reasons discussed at length in the State of Utah's Memorandum in Opposition. Additionally, the City cannot demonstrate it will suffer irreparable harm without the issuance of an injunction; that the alleged injury to the City outweighs the threatened injury of granting the broad injunctive relief that it requests; or that the injunction would not be adverse to the public interest.

[2] The Utah Supreme Court has long recognized "the persuasiveness of federal interpretations when the state and federal rules are similar and few Utah cases deal with the rule in question." *Barton v. Utah Transit Auth.*, 872 P.2d 1036, 1039 n.5 (Utah 1994). Moreover, when Utah Rule of Civil Procedure 65A was revised in 2014, the Advisory Committee noted that the grounds for entry of a restraining order or injunction were "derived from" Tenth Circuit case law, and that "[t]he substantial body of federal case authority in this area should assist the Utah courts in developing the law under paragraph (e)." Advisory Committee Note to Utah R. Civ. P. 65A (May 1, 2014 amendments).

I. THE CITY SEEKS TO DRAMATICALLY ALTER THE STATUS QUO.

Utah courts have consistently explained that the purpose of a preliminary injunction is to "preserve the status quo pending the outcome of the case." *Zagg, Inc. v. Harmer*, 2015 UT App 52, ¶ 8, 345 P.3d 1273 (internal quotation marks omitted).[3] Here, the City is plainly seeking to change the status quo. As the Motion makes clear, the statutes the City challenges have been effective since March 2018—more than fifteen months before the City filed the Motion. Although certain aspects of the statutes underlying the UIPA were amended in 2019, the Motion is not concerned with those amendments. *See* Motion at 3 ("The legislation was amended in 2019, but it still includes provisions that delegate powers to the [UIPA] with respect to land use decisions for the jurisdictional land and the management and spending of tax revenue generated by development on the jurisdiction land."). Thus, the City has known since early 2018 exactly how the creation of the UIPA would impact its powers over jurisdictional land and tax differential. Yet the City waited a full year—until March 2019—to file this action. But even then, the City did not serve the Complaint or move for injunctive relief. Instead, this case sat dormant for another three months.

The City now asks this Court to, among other things, stop the UIPA from proceeding with the design of infrastructure improvements and bar it from committing property tax differential, even where the statutes enacted in 2018 expressly authorizes the UIPA to do so. Since the Act was enacted, the UIPA has been moving forward with preliminary business

[3] For this reason, federal courts applying Federal Rule of Civil Procedure 65A, which is similar in key respects to Utah's Rule 65A, have required that an applicant seeking a preliminary injunction that would alter the status quo or compel conduct satisfy a heightened burden. *See, e.g.*, *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004).

planning and public outreach and substantial efforts have been undertaken to recruit investment from businesses that might relocate or expand in Utah. (Hedge Decl. ¶ 8; Hart Decl. ¶¶ 8-10.) Barring the UIPA from committing tax differential would fundamentally change the status quo by prohibiting the UIPA from doing something it has had the statutory right to do for 17 months. Because the City's Motion seeks to alter the status quo it "must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." *Pacific Frontier*, 414 F.3d at 1231 (internal citation omitted).

II. TH CITY WILL NOT SUFFER IRREPARABLE HARM IF THE INJUNCTION DOES NOT ISSUE.

In the Motion, the City argues that it will "suffer irreparable harm if the [UIPA] is permitted to spend and/or commit the City's tax revenue or to proceed with the planning or construction of site improvements and public infrastructure for the jurisdictional land during the pendency of this litigation." (Motion at 13). For the reasons explained below, none of the specific examples of alleged irreparable harm referenced by the City will occur if the City's Motion is denied.

A. The UIPA Will Not Spend Tax Differential Money Until February 2020 at the Earliest.

The City contends that "[i]rreparable harm will occur if the [UIPA] is permitted to spend . . . tax revenue . . . during the pendency of this litigation because these are decisions that once made are difficult if not impossible to reverse and have impacts that cannot be remedied by a damages award alone." (*Id.* at 14). But contrary to the City's contention, there is absolutely no imminent threat of the UIPA spending tax differential monies. As an initial matter, Section 11-58-602(6) of the Utah Code states that the UIPA "may not spend property tax differential

revenue collected from [UIPA] jurisdictional land" until a business plan is formally adopted by the UIPA's Board. And the UIPA Board will not be in a position to adopt such a business plan until December 31, 2019, at the earliest, because its business plan will not be completed until then. (Hedge Decl. at ¶ 9).

Furthermore, even if the UIPA were to adopt a business plan at an earlier date, which does not appear to be a possibility, no tax differential funds will be transferred to the UIPA until sometime in the first quarter of 2020. (*Id.* at ¶ 5). The funding received from the property tax differential is a function of how the process of property tax payment, collection, and distribution occurs. (*Id.*). Specifically, property tax payments in Salt Lake County are due in November and generally flow into the County throughout December. (*Id.*). It should be noted that the jurisdictional boundary of the UIPA (as now drawn) covers multiple jurisdictions and that the property tax differential that is scheduled to flow to the UIPA will be based on increased property values—with some coming from municipalities other than Salt Lake City.[4] Therefore, the County must then determine which parcels are part of the UIPA jurisdictional area as well as which municipal jurisdiction that property resides in to decide which funds should flow to the UIPA. (*Id.*). That process should be completed within 30 to 60 days of the calendar year end, meaning that transfer of funds from the County to the UIPA is not expected to happen before February or March of 2020. (*Id.*).

Because the UIPA will not receive tax differential funds until approximately February 2020, the City's argument that there is an imminent risk of the UIPA spending tax revenue is entirely misplaced and should be rejected. This is particularly true because the UIPA and the

[4] *See* https://stories.opengov.com/saltlakecity/published/XD8i_guT3.

State of Utah have requested that the Court hear dispositive motions in this matter in October 2019, which would allow the Court to fully resolve this matter on the merits before the UIPA ever receives a single dollar of tax differential revenue. (*See* Dkt. No. 32).

Finally, it is important to keep in mind that the total estimated property tax differential to be directed to the UIPA in February or March of 2020 from within the UIPA's jurisdictional boundary, including from property located within Salt Lake City, is less than half a million dollars. (*Id.* at ¶ 6). Thus, even if the Court were to ignore the fact that the UIPA will not be statutorily authorized to receive those funds until early 2020, and will not receive those funds (or have any opportunity to spend them) until February 2020 at the earliest, the most the City could ever be harmed throughout 2020 is about $462,000, which is less than .015 percent of the City's approved budget of $331,000,000 for 2019-2020.

B. The UIPA Will Not Pledge or Encumber Tax Differential Money Without Expressly Conditioning the Pledge on the UIPA Prevailing in this Action.

Another of the few concrete examples of alleged irreparable harm the City identifies in its Motion is "the decision by the [UIPA] to take a five million dollar loan from UDOT for development of roads and infrastructure and to commit the City's tax differential as the sole source of income for the repayment of the loan." (Motion at 15). This argument is unavailing for at least two independent reasons.

First, because of the uncertainty created by the City's lawsuit, any loan that is made that is secured by tax differential monies—including any loan from UDOT—will necessarily provide that the tax differential monies will not be available if the City prevails in this lawsuit. (Hedge Decl. at ¶ 11). In other words, if the City wins, the tax differential dollars will never be at risk. (*Id.*).

Second, even if a loan were made that were secured by City tax differential, the UIPA will not begin design work, much less construction work, on roads or infrastructure until April or May 2020 at the earliest. (*Id.* at ¶ 12). Thus, any funds obtained from the loan could not and would not be spent until after this case is resolved on the merits. Thus, the risk alleged by the City simply does not exist.

C. The UIPA's "Design" of Infrastructure Improvements Will Not Cause Irreparable Harm to the City Because No Construction Will Take Place Before March 2020.

The City also dedicates a significant portion of its Motion, and supporting declarations, to addressing the wholly hypothetical concern about ***if*** a decision were made "to extend 7200 West north over the old municipal landfill." (Motion at 17). The City then offers a parade of horribles regarding the cost of remediating the landfill should such a decision be made. But this supposed harm is entirely speculative and, in any event, is certain ***not to occur*** while this case is pending. The "UIPA does not own or lease the old landfill site, has no right to build a road on such site, and has no plan at this time, and is not aware of any plans, to construct a road 'across the old landfill site.'" (Hedge Decl. at ¶ 13). And "[n]o decision on whether such a road [would] even [be] useful or necessary [could] be made before February 2020 and any acquisition of land rights, and the design or construction of such a road would not begin for many months, if not years, thereafter." (*Id.*). Because any decisions regarding the potential extension of 7200 West are at least a year away, and construction sometime after that, the City's concerns about hypothetical irreparable harm resulting from such decision are completely meritless.

The City essentially acknowledges that design of infrastructure, standing alone, will not cause any irreparable harm. The City argues that, "in the event the Court agrees with the City

and finds the delegation of power to the [UIPA] to make decisions regarding the design, placement, and construction of site improvements and municipal infrastructure violates the Utah Constitution, it will be impractical and expensive if not impossible to reverse such decisions, ***especially after construction begins***." (Motion at 16 (emphasis added)). Of course, it is neither impossible nor expensive for the City to simply *not implement* designs that the City finds undesirable, which presumably is exactly what the City would do if it were to prevail in this action. In that circumstance, the worst thing that would happen is that the UIPA would have wasted time and money (allocated from the State's general fund) on planning improvements that will never be constructed. Even if that were to occur, the City would suffer absolutely no harm because none of the property tax revenue the City claims it is entitled to will have been used or unconditionally committed.

The City's citation to *Colorado Wild Inc. v. United States Forest Service*, 523 F.Supp.2d 1213 (D. Colo. 2007), for the proposition that mere design work can constitute irreparable harm is unavailing, in part because the City does not accurately represent what was at issue in that case. The City suggests that the *Colorado Wild* court found that "preliminary steps such as design and engineering plans for the road" would create irreparable harm justifying injunctive relief. (Motion at 14-15). But, in fact, the party opposing the injunction in *Colorado Wild* wanted to do far more than create "design and engineering plans," including "design ***and construction***" of a road extension. *Id.* at 1220 (emphasis added). Furthermore, the court's concerns about "the difficulty of stopping a bureaucratic steam roller," are not applicable here because if this Court were to find the UIPA unconstitutional, any "steam roller" would immediately grind to a halt. In *Colorado Wild*, the court was concerned that, "in the event the

Forest Service's [decisions] are overturned and the agency is required to 'redecide' the access issue, the bureaucratic momentum created by Defendants' activities will skew the analysis and decision-making of the Forest Service toward its original, non-NPEA complaint access decision." *Id.* at 1221. Here, by contrast, there will be nothing to be "redecided" if this Court declares the UIPA unconstitutional—the UIPA will cease to exist and will have no power to do anything. If the City's authority over infrastructure is restored, then the City can do what it wants, and there will be no "bureaucracy" to stand in its way. Thus, *Colorado Wild* is entirely inapposite.[5]

D. The City's Significant Delay in Filing the Motion Undercuts any Argument of Immediate and Irreparable Harm.

The Act became effective in March 2018, and the City waited a year to file suit and another three months before filing the Motion. Neither the delay of one year before filing suit, nor the further delay of three months between filing suit and seeking injunctive relief, is explained by the City. As courts have explained, "[a]ny delay in seeking relief cuts against a claim that there is an urgent need for immediate relief and that a judgment would be rendered ineffective unless some restraint is imposed on [the non-moving party] pending an adjudication on the merits." *Nilson v. JPMorgan Chase Bank, N.A.*, 690 F. Supp. 2d 1231, 1256 (D. Utah 2009); *see also, e.g.*, *Exec. Boat & Yacht Brokerage v. Aramark Sports & Entm't Servs.*, No. 2:07CV69DAK, 2007 U.S. Dist. LEXIS 16303, at *10 (D. Utah Mar. 7, 2007) ("Absent a good

[5] The City's reliance on *Wisdom Imp. Sales Co., LLC v. Labatt Brewing Co*., 339 F.3d 101 (2d Cir. 2003) is equally unavailing. In *Wisdom*, the Second Circuit concluded that the breach of a contract constituted irreparable harm to support a preliminary injunction because the plaintiff had "expressly negotiated for and received the right to veto certain transactions with which it disagreed before those transactions commenced" and because that right would be "irretrievably lost upon breach." *Id.* at 113. Here, the City had no preexisting contractual or statutory right to veto any actions taken by the UIPA. It is therefore entirely unclear why the City thinks the *Wisdom* opinion supports its position, which is not the case.

explanation . . . a substantial period of delay . . . militates against the issuance of a preliminary injunction by demonstrating that there is no apparent urgency to the request for injunctive relief." (internal quotation marks omitted)); *Utah Gospel Mission v. Salt Lake City Corp.*, 316 F. Supp. 2d 1201 (D. Utah 2004) ("Preliminary injunctions are generally granted under the theory that there is an urgent need for speedy action to protect the plaintiffs' rights. Delay in seeking enforcement of those rights, however, tends to indicate at least reduced need for such drastic, speedy action."). Where, as here, a plaintiff waits more than "a year before seeking any relief, . . . [the] [d]elay undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." *Exec. Boat & Yacht*, No. 2:07CV69DAK, 2007 U.S. Dist. LEXIS 16303, at *10.

# # #

In sum, because no design of infrastructure improvements will begin until well after March 2020 at the very earliest (and as a practical matter construction cannot begin until sometime after the business plan is completed), the City's claim of irreparable harm from the commencement of construction is entirely unfounded. Likewise, given that the UIPA will neither spend tax differential money until sometime after February 2020 nor commit such funds in any way that would actually create risk to the City, the City's Motion is entirely unnecessary and is a waste of public resources and this Court's time. The UIPA is eager to have this case resolved on its merits as quickly as possible, which is a sentiment the City should share if it actually believes in the merits of its claims and is sincere about its desire to mitigate any harm to the parties. But the City's insistence on pursuing this Motion—instead of proceeding immediately to dispositive motions—suggests the City is more concerned about scoring either a

political or a public relations victory through the entry of an injunction that is both unnecessary and wholly inappropriate. Because the City has failed to demonstrate that any irreparable harm will occur without the relief it requests—a fact the UIPA advised the City of immediately after the City filed its Motion—the City's Motion should be denied in its entirety.

III. ANY THREATENED INJURY TO THE CITY DOES NOT OUTWEIGH THE DAMAGE THE PROPOSED INJUNCTION WOULD CAUSE.

Even if the City could theoretically identify an injury in the absence of injunctive relief, which it has not done, the threatened injury to the City does not outweigh the significant damage that the proposed injunction would create for the UIPA and the State. In contrast to the hypothetical harm the City has identified that, for reasons discussed above, will not materialize during the pendency of this action, the potential harm that issuance of an injunction would cause for both the UIPA and the State of Utah is tremendous, real, and far from hypothetical.

For example, the State is currently involved in negotiations "with a number of very prominent companies that are interested in making substantial investments within the [UIPA's] jurisdictional area." (Hart Decl. at ¶ 8). The magnitude of the investments under discussion is likely to exceed $100 million and would create more than 3,000 jobs with a likely salary of $100,000 or more per year. (*Id.*). Importantly, however, most if not all of the companies participating in these negotiations are considering making investments in other states, consider the availability and magnitude of financial incentives from relevant jurisdictions a key factor in their decision making processes, and plan to decide where to relocate within the next 9 to 12 months. (*Id.* at ¶¶ 9-10). Thus, if the UIPA were unable to conditionally commit tax differential that the UIPA is scheduled to receive under the Act as part of the pack of incentives offered to these potential investors, the State of Utah will have an enormous competitive disadvantage in

recruiting these companies and the companies will likely invest in other states. (*Id.* at ¶ 11).

In addition to depriving the citizens of Utah of these investments, tax revenue, jobs, and salaries, the City's request to bar the UIPA from proceeding in any way with general design of site improvements would cause immediate and irreparable harm to the UIPA because "planning" of the potential types and uses of certain kinds of site improvements and public infrastructure is an essential part of, among other things, the UIPA's business plan, which is presently in progress. (Hedge Decl. ¶ 14). At this time, and through the remainder of this year and well into 2020, the UIPA is and will be operating on and spending funds allocated by the legislature from the general fund, which presents absolutely no risk to the City. If the UIPA cannot undertake "planning" activities related to the jurisdictional land during the pendency of this action using these general funds, the UIPA will effectively be brought to a stand-still. (*Id.*).

Furthermore, the UIPA is statutorily charged with: (1) planning and facilitating the development of an inland port; (2) managing an inland port; (3) "establish[ing] a foreign trade zone, as provided under federal law, covering some or all of the authority jurisdictional land or land in other authority project areas;" (4) "engag[ing] in marketing and business recruitment activities and efforts to encourage and facilitate development of authority jurisdictional land;" (5) buying, conveying, or leasing real property; (6) "issu[ing] bonds to finance the undertaking of any development objectives of the authority;" and (7) "hir[ing] employees." *See* Utah Code Ann. § 11-58-202. If the City's Motion were granted, the UIPA's ability to engage in most, if not all, of these activities would be severely compromised.

It is also important to consider that, if the UIPA were enjoined from designing infrastructure improvements or committing tax differential, the development of any inland port at

any location in this State—whether by the City or the State—would effectively grind to a stop. If the City' Motion were granted, the City could not engage in infrastructure improvements in the jurisdictional area, as doing so would plainly violate the Act, and the City has not asked for a mandatory injunction that would allow the City to ignore the Act's delegation of authority.

Simply stated, the City has failed to demonstrate that it will suffer any irreparable harm and any threatened injury the City allegedly faces does not outweigh the significant and very real damage that the proposed injunction would create for the UIPA. The City's Motion should therefore be rejected.

IV. THE REQUESTED INJUNCTIVE RELIEF WOULD BE ADVERSE TO THE PUBLIC INTEREST.

The creation of the UIPA was the result of years of efforts by the Governor and the Legislature to "fulfill the statewide public purpose of working in concert with the applicable state and local government entities, property owners and other private parties, and other stakeholders to encourage and facilitate development of the authority jurisdictional land and land in other authority projects to maximize the long-term economic and other benefit for the state . . . ." Utah Code Ann. § 11-58-201(3)(a). The UIPA is projected to create between 12,000 and 24,000 jobs in the State of Utah. (*See* Utah Inland Port – Feasibility Analysis, Table 7.1, *available at* http://wtcutah.com/wp-content/uploads/2018/01/Inland-Port.pdf). Moreover, negotiations are underway that could result in the private investment of more than $100 million in investments in the State. (Hart Decl. at ¶ 8). The UIPA and its Board of Directors are engaged every day in efforts to make this vision a reality. (Hedge Decl. at ¶ 4). Ordering the UIPA to halt these efforts, to not conditionally commit any tax differential, and to not engage in any planning activities pending the resolution of this lawsuit would be manifestly adverse to the public interest

by needlessly depriving Utah's citizens of the myriad benefits the UIPA will create.

Simply put, granting the City's requested relief would substantially impair the development of the UIPA in a manner that would do massive and irreparable damage to the UIPA, the State, and its citizens—both individual and corporate. Because the City's requested relief is strongly adverse to the public interest, its Motion should be denied.

CONCLUSION

For the foregoing reasons, the City's Motion should be denied in its entirety.

DATED this 2nd day of August, 2019

MICHAEL BEST & FRIEDRICH, LLP

/s/ Evan S. Strassberg
Evan S. Strassberg
Steven J. Joffee
Counsel for the UIPA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of August, 2019, the foregoing document filed on the Court's electronic filing system, which automatically effectuated service of process upon the following:

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/s/ Evan S. Strassberg

EXHIBIT A

Declaration of Jack Hedge

DECLARATION OF JACK C. HEDGE

I, Jack C. Hedge, state and testify under oath as follows:

1. I am over 18 years of age, give this testimony based on my personal knowledge, and am competent to testify thereto.

2. I am the Executive Director of the Utah Inland Port Authority ("UIPA"), a defendant in the above-captioned matter.

3. UIPA was established pursuant to the Utah Inland Port Authority Act ("Act"), Utah Code Ann. § 11-58-101 *et. seq.* (the "Act").

4. UIPA and its Board have been tasked with the responsibility of making the vision that drove the creation of the UIPA a reality.

5. The UIPA will, by statute, ultimately receive property tax differential as its primary source of funding. However, no such funds will be transferred to UIPA until sometime late in the 1st Quarter of calendar year 2020. The funding received from the pending property tax differential is a function of how the process of property tax payment, collection, and distribution occurs. It should also be noted that the UIPA jurisdictional boundary includes property in multiple jurisdictions, not just that of the City. Specifically, property tax payments in Salt Lake County are due in November, and, to the best of my knowledge and understanding, will generally flow into the County throughout December. The County must then determine which parcels are part of the UIPA jurisdictional area as well as which municipal jurisdiction that property resides, and thus which funds should flow to the UIPA. That process should be completed within 30 to 60 days of the calendar year end, meaning that transfer of funds from the County to UIPA is not expected to happen before late in Q1 of 2020. Therefore, there is no

chance that the UIPA will spend monies derived from the pending tax differential before late in the first quarter of 2020.

6. The total amount of property tax differential that has been budgeted for 2019-2020 (in other words, the funds the UIPA expects to receive from Salt Lake County in property tax differential in February 2020) is $461,367. Again, while the majority of this will come from property within the municipal boundary of the City, not all of it will. Again, none of these monies will flow to the UIPA until late in Q1 2020.

7. Between now and when the UIPA begins receiving tax differential monies, any funds UIPA expends are monies allocated to UIPA by the legislature from general state funds. The City has no claim or interest in how the UIPA allocates or spends any of these allocated finds.

8. The City is correct when it states that, "upon adoption of a budget and business plan, the Board can immediately start spending the property tax revenues directed to it by the Act or commit those funds to debt service for projects the Authority selects." City's Motion at 8. To that end, on June 5, 2019 UIPA's Board approved a budget for FY July 1, 2019-June 30, 2020. However, to date the UIPA Board has not approved a business plan. The UIPA has retained outside consultants to conduct a series of community outreach meetings to identify issues, hold task force planning meetings to consider and make plans to deal with such issues, develop alternatives or scenarios for port development for consideration and selection by the board and take other actions necessary to draft, amend and ultimately finalize the UIPA's business plan. Finalization of the business plan by the consultants is not expected to be completed before the end of the calendar year (December 31, 2019) at the earliest. UIPA's Board may or may not

review and revise drafts of the plan but Board approval can only occur after the business plan is finalized. We anticipate that the draft business plan will present to UIPA's board a minimum of three alternative proposals with very different structural concepts for how the UIPA will be operated, how and what it will own, and other fundamental matters.

9. Once the draft business plan is received from the consultants (again, sometime around the year-end 2019), it must then be reviewed, considered, and acted upon by the UIPA Board. Assuming this happens immediately upon completion, once the business plan is approved, it will take many months of planning before any design, development or construction of any infrastructure improvements or other major activities can commence.

10. By statute, the UIPA "may not spend property tax differential revenue collected from [UIPA] jurisdictional land" until the business plan is formally adopted by the UIPA Board. Utah Code Ann. § 11-58-602(6). Again, I do not anticipate that the business plan will be formally adopted before January 2020 at the earliest, nor is it anticipated that any of the monies derived from the proposed tax differential will flow to the UIPA until late in Q1 2020.

11. The City is also correct when it states that the UIPA is authorized by statute to apply for and receive a $5,000,000 loan from UDOT that will be secured by property tax differential. With the uncertainty caused by the City's lawsuit, any pledge that UIPA makes of tax differential as security for any loan—including the proposed loan from UDOT—will necessarily and invariably be conditional. Specifically, if UIPA determines to apply for the loan from UDOT, it will not make any pledge of tax differential usage without the express written acknowledgement of both parties to any such agreement that such commitment will only be binding if this Court rules that the Legislature's creation of the UIPA was not unconstitutional.

UDOT may not be willing to make the loan with such contingency. In any event, if this Court were to find that the creation of UIPA was unconstitutional, no property tax differential monies would be at risk. In other words, the property tax differential will not be encumbered or otherwise committed without containing the language stating that such encumbrance or commitment is contingent on the determination by the Court in this case that the creation of the UIPA is constitutional.

12. UIPA will not begin work on the "design, development or construction" of any infrastructure projects until sometime after the business plan is approved by the Board, estimated as some time in Q1 2020.

13. The City expresses particular concern about what may happen "[i]f a road is constructed across the old landfill site [just north of I-80 between approximately 6000 West and 7600 West]," and the "significant remediation" that would allegedly be required if such a road were constructed. UIPA does not own or lease the old landfill site, has no right to build a road on such site and has no plan at this time - and is not aware of any plan - to construct a road "across the old landfill site" as called out in the City's petition. No decision on whether such a road is useful or necessary would be made before Q1 2020 and any acquisition of land rights, and the design or construction of any road, would not begin for many months, if not years, thereafter. There is no reasonable scenario under which the UIPA would undertake any such project until the middle of 2020 at the very earliest.

14. The City is also asking this Court to enjoin the UIPA from "proceeding in any way with the planning . . . of site improvements or public infrastructure for the jurisdictional land." As stated previously, the UIPA is not in the process of planning any specific piece of "site

improvements or public infrastructure for the jurisdictional land". The UIPA's planning, at this time, is limited to broad business planning and the creation of potential development scenarios as it relates to the policies, procedures, and business practices of the UIPA. It does not include any specific infrastructure or site improvements other than how the UIPA can condition the use of any of the available tax differential to incentivize certain types of infrastructure and site improvements by owners and developers of the land. Imposing such a broad and over whelming constraint would cause immediate and irreparable harm to the UIPA. "Planning" of the potential types and uses of certain kinds of site improvements and public infrastructure is an essential part of, among other things, the business plan that is presently in progress. The City's request to enjoin the UIPA in this manner is solely designed to effectively "strangle the baby in the basket" because if the UIPA cannot undertake "planning" activities related to the "jurisdictional land" during the pendency of this action, the UIPA will effectively be brought to a stand-still.

15. The City's concern about the "bureaucratic steamroller" effect is completely misplaced. The City retains its permitting and planning rights and therefore, its control over any actual construction and land use in the "jurisdictional lands" that fall within its boundaries. In the event the UIPA is determined to be unconstitutional, all business planning (and the resultant expenditures of tax differential money) will necessarily stop at that time. However, if in the interim the UIPA is barred from engaging in any planning activities, or from engaging with business enterprises and other parties that are interested in making investments in Utah, the harm to the UIPA and the State will be truly irreparable.

16. The City has publicly referred to the creation of UIPA as a "land grab" by the state of Utah. However, the reality is that no land is owned by the UIPA, no land is taken from

any land owner, and no right or title to any land in the jurisdictional boundary has been ceded to the UIPA. As the City correctly described in the complaint, hundreds of millions of taxpayer dollars (from all the taxpayers in the state of Utah) is being spent by the State of Utah to facilitate the relocation of the prison to the area in question. The investment in the infrastructure to support the development of the prison site include road, water, sewer, electrical and other infrastructure benefits all the surrounding property owners. With the formation of the UIPA, the State acted to secure the potential differential in rising property values in the area resulting from its significant investment to secure a return on the investment it made for the benefit of all citizens of the State. All of Utah's taxpayers should benefit from the resultant increase in property values created by the State's investment by allowing the resultant tax differential to flow to the State created UIPA, rather than only to the City for its sole use.

I declare under penalty of perjury under the laws of the State of Utah that the foregoing is true and correct.

EXECUTED on this 1st day of August 2019.

/s/ Jack C. Hedge
Jack C. Hedge

EXHIBIT B

Declaration of Benjamin Hart

DECLARATION OF BENJAMIN HART

I, Benjamin Hart, declare under penalty of perjury as follows:

1. I am over the age of 18, and am a resident of the State of Utah. Except where specifically noted otherwise, I have personal knowledge of the matters set forth herein, and could and would testify to the same in court if called upon to do so.

2. I am the Deputy Director of the Governor's Office of Economic Development (the "GOED"), a position I have held since March, 2017.

3. The GOED, under the direction of Governor Gary Herbert, provides resources and support for business creation, growth and recruitment in the State of Utah. The GOED also drives increased tourism and film production in the State.

4. As Deputy Director of the GOED, I help develop the strategic direction of the office. I also oversee corporate recruitment and incentives, the diplomacy office, strategic partnerships, and a number of other programs designed to help expand Utah's economy.

5. Corporate growth, both from within the State of Utah and from businesses expanding or relocating to the State, is critical to Utah's continued economic success. When companies create or expand their presence in Utah the economic impact is often lasting and far-reaching, particularly in the creation of quality jobs for Utahns.

6. It is often the case that corporate recruitment includes offering financial incentives for local and out-of-state companies seeking to expand or relocate to Utah. Incentives are available to select companies creating new, high-paying jobs that improve quality of life, increase the tax base and diversify the economy.

7. Incentives offered to such companies include tax credit rebates or grants, and the incentives are disbursed only after the company has met contractual performance benchmarks such as job creation and payment of new state taxes.

8. The GOED is actively negotiating with a number of very prominent companies that are interested in making substantial investments within the Utah Inland Port's jurisdictional area. The magnitude of the investments under discussion likely exceeds $100,000,000, and the investments, if undertaken, could create more than 3,000 jobs that will likely have an average salary of $100,000 or more per year.

9. Most if not all of the companies with which the GOED is negotiating will be making decisions regarding where they will relocate within the next 9-12 months, and all are considering making these investments in states other than Utah.

10. One of the key factors for these companies in deciding where to make their investments is the availability and magnitude of financial incentives from relevant jurisdictions.

11. If the UIPA were unable over the next year to commit the tax differential that is scheduled to flow to the UIPA pursuant to the enacted statutory scheme as part of the package of incentives GOED can offer, Utah in general, and the Inland Port jurisdictional area more specifically, would be at a huge competitive disadvantage in recruiting these companies, and will likely lose these companies to other states. Based on my knowledge of the companies at issue and the incentives that other states tend to offer, I strongly believe that most if not all of the companies we are negotiating with for investments in the Inland Port will choose to make those investments elsewhere if we cannot commit the UIPA's tax differential. In several cases we have been recruiting these companies for several years and they represent a significant opportunity to create significant generational economic multipliers. In short these companies will have a

tremendous impact on important Utah industries for decades to come. Without the local tax differential offered by the UIPA these opportunities will likely be lost.

12. In offering UIPA tax differential as an incentive to companies looking to invest within the Inland Port jurisdictional area, the GOED and the UIPA will make it clear that the funds will not be available if the creation of the UIPA is determined to be unconstitutional. Thus, no tax differential funds will be at risk if Salt Lake City prevails in this lawsuit.

I declare under penalty of perjury under the laws of the State of Utah that the foregoing is true and correct.

Executed this 29th day of July, 2019

Ben Hart

Benjamin Hart